

Lights, Camera, Affirmative Action: Does Hollywood Protect Minorities?¹

Pedro Rubim Borges Fortes²

I. Introduction

The interplay between law and cinema is extremely important as representations of popular culture influence legal cultures and have the power to ultimately change positive law. In this sense, legal culture is an important reservoir of ideas, attitudes, and perceptions of law, that influences the transformation of materials from the broad range of popular culture – novels, films, and other social artifacts – into legal materials – opinions, rulings, and norms.³ Therefore, the argument presented by this essay is that Hollywood films could very well be a source of legal change. Even though lawyers may refrain from citing *Guess Who's Coming to Dinner* (1967) in their briefs and judges will not mention *Brokeback Mountain* (2005) as a rationale for their decisions, cinema and other forms of popular culture, such as novels and television, nevertheless remain highly influential in shaping the legal universe and preparing the juridical field for groundbreaking verdicts regarding sexual orientation.⁴

Popular representations of discriminatory practices from Hollywood films carry conceptions of injustice and, therefore, have significant impact on the protection of minorities. Images of subordinate African-Americans or gay men have entered the socio-cultural psyche of many societies across the globe. Once internalized inside minds and hearts of judges, lawyers, and activists, these images of unfair practices provide the grounds for social mobilisation towards, for example, the legal recognition of affirmative action or same sex marriage. Obviously, cinema does not function independently from the society in which it is produced. Film-makers and law-makers are not isolated decision-makers that produce meaning from a privileged standpoint.⁵ On the contrary, Hollywood films often reproduce

¹ This essay was presented at the Law and Public Affairs Discussion Group at the Faculty of Law at the University of Oxford and at the “Law and Pop Culture: International Perspectives” Conference at Tilburg University in 2013. I benefited enormously from the feedback of participants and would like to thank especially Iginio Gagliardone, Christoph Berlin, David Restrepo Amariles, Francisco Urbina, Po-Hsiang Ou, Michael Asimow, Richard Weisberg, Peter Robson, Leslie Moran, and Christine Corcos for their comments, suggestions, critiques, and feedback. I am also grateful to the lawyer and the LGBT activist, whom I interviewed. Errors are all mine.

² Professor of Law at FGV Law School (Rio de Janeiro) and Research Associate at the Centre for Socio-Legal Studies, University of Oxford; DPhil c., Centre for Socio-Legal Studies, Oxford; J.S.M. Stanford Law School; LL.M. Harvard Law School; Grad. Cert. at COPPE/UFRJ; BA in Business at PUC-Rio; LL.B. at UFRJ; Public Prosecutor at Attorney General's Office, Rio de Janeiro.

³ Lawrence Friedman, ‘Law, Lawyers, and Popular Culture’ (1989) 98 Yale Law Journal 1579.

⁴ The notion of ‘juridical field’ was coined by Pierre Bourdieu in his works on critical anthropology as one of the several ‘fields’ in a given society that are transformed through power dynamics in an interplay with the ‘habitus’, a reservoir of practices, ideas, and norms that shape and are shaped by the ‘field’. See Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’(1977) 38 Hastings Law Journal 805; Pierre Bourdieu, *An Outline of a Theory of Practice* (Cambridge University Press, 1977)

⁵ In contemporary philosophy, this idea is expressed by the reference to an ‘archimedean point’ - a vantage point to which a person would have removed herself and, thus, could have an objective view of the subject

standard social norms thereby reinforcing discriminatory stereotypes within a given society simply by, for example, emphasizing the search for romantic love of white heterosexual couples as the leading motif of contemporary cinema.

Nonetheless, alternative narratives also depart on occasion from the mainstream and provide compelling symbols of subordination of minorities.⁶ These films raise the level of consciousness about discrimination due to race or sexual orientation and the archetypal images of injustice towards African-Americans and gay men become a part of the repertoire of popular culture. In this context, films like *Guess Who's Coming to Dinner?* (1967) and *Brokeback Mountain* (2005) disseminate ideas that contribute to the suppression of discriminatory practices, once minorities articulate their emancipative claims in the juridical field before courts, congress, or the government. Even when these films are not expressly mentioned in the text of legal opinions, their symbolic value is part of the law-making process due to the interplay between cinema and law.

This argument can be supported by empirical evidence. Based on empirical observation of films and cases in U.S. courts involving the protection of racial and religious minorities, the argument that there is a dialogue between cinema and law begins to take shape. Observing the Hollywood films that were nominated for best motion picture at the Academy Awards during the terms of various different U.S. Supreme Court Chief Justices, one may note the high number of movies that focus on racial minorities during the Warren court. Film-makers and law-makers were essentially establishing a dialogue with American society regarding the issue of discrimination within it⁷. Hollywood blockbusters – along with landmark judicial precedents – were symbolic artifacts that mediated debate in the social field during the period of abolition of the ‘separate but equal’ doctrine and the aftermath of the Holocaust. In addition to cinema and law, social activists intensively challenged the status quo and were decisive in the process of social transformation that reshaped the United States.

The empirical data, however, does not provide grounds for an argument of causation. It is probably impossible to prove that society changed because of messages transmitted by popular culture, simply because art is also a social phenomenon embedded in society. Therefore, it is simply artificial to isolate a work of art and suggest that, for instance, a single film was responsible for broad social transformation. On the other hand, it seems difficult to deny the role of cinema in disseminating the core tenets of the rights revolution during the civil rights and human rights era, for instance. Some scholars like the metaphor of a mirror or of a lamp,⁸ but my argument here is that cinema may function as a resonance chamber that amplifies the sound of these messages, making them much louder and more difficult to ignore. For instance, many films with an anti-discriminatory message got nominated for Oscars during the Warren Court period, establishing a certain dialogue between Hollywood and the U.S. Supreme Court.

of observation in its totality. The notion of a god eye's perspective, however, is rejected in contemporary empirical studies.

⁶ This idea is inspired by the notion of ‘hegemony’ and the possibility of development of counter-hegemonic ideas too. See Antonio Gramsci, *Prison Notebooks* (Columbia University Press, 2011)

⁷ See generally Pedro Fortes, ‘Affirmative Cinema: When Film-Makers Defend Minorities’ in Michael Asimow, Kathryn Brown, and David Ray Papke (eds.) *Law and Popular Culture: International Perspectives* (Cambridge Scholars Publishing, 2014)

⁸ See, for instance, Lawrence Friedman, *The Fun-House Mirror: Law and Popular Culture*, Journal of the Oxford Centre for Socio-Legal Studies (2017)

Another prominent argument, however, rests on the impact of Hollywood movies beyond national borders. In contrast with judicial precedents, Hollywood blockbusters are quickly translated, widely distributed, and pervasively publicized. As previously mentioned, films such as *Brokeback Mountain* (2005) can function to disseminate the injustice of homophobia globally. On one hand, these symbolic images of injustice flow from the United States to the peripheries without the social field in which they were produced. On the other hand, in the absence of activist courts and legal entrepreneurs, Hollywood films can initiate a process of agenda-setting for dormant social movements that culminates in emancipative action. In this sense, the impact of Hollywood films is evident and one case study of a recent decision from the Brazilian Supreme Court clearly demonstrates this impact on legal change. Without citing the recent precedents from the State Supreme Courts of Hawaii⁹, Massachusetts¹⁰, California¹¹, and Iowa¹², the Brazilian Supremo Tribunal Federal accepted same-sex marriage and altered the concept of marriage in Brazilian law, even though the Constitution expressly refers to this union as a legal relationship between a man and a woman. Without the transformation operated on the social field by popular culture, the juridical field would probably not have changed.

Finally, it seems ironic that some local minorities are vulnerable when they do not have any correspondence with minorities depicted in Hollywood films. In the past decades, Brazilian society established an ambitious program of affirmative action in public universities that guarantees quotas for black students. This program has changed the allocation of resources and opportunities for racial minorities in Brazil. However, it favors only candidates whose racial origins are similar to the African Americans depicted in Blaxploitation films. On the other hand, there are no equivalent 'affirmative action' policies for individuals coming from indigenous cultures or for local migrants from the poor Northern states. Even if these minorities are somewhat similar to the Native Americans or to the Latino immigrants in the United States, Brazilian migrants and indigenous peoples do not identify themselves with their North American counterparts. While gay and black men are represented regardless of nationality by characters in *Brokeback Mountain* (2005) and *Guess Who's Coming to Dinner* (1967), Brazilian migrants do not feel empathy for Puerto Rican or Mexican characters.

Likewise, most Brazilians are aware of the Holocaust and the suffering of the Jews during and beyond the World War II. Nonetheless, awareness of discrimination against this religious minority does not mean that the Brazilian audience will acknowledge that other local religious minorities also need protection. For instance, Santeria believers suffer discrimination in Brazil and Hollywood films carry no message that may protect them. These and other limitations of cinema as a protective tool should also be noted.

In the next section, I will analyze a case study in which the Brazilian Supreme Court recognized the constitutionality of same sex marriage, even though the constitutional text describes family as an entity originated by the union between a man and a woman. I argue that the Brazilian Justices were more influenced by films and television than by American scholarship or law. In section 3, I will highlight the critical role played by Hollywood films

⁹ Baehr v. Lewin, 74 Haw. 530, 852 p.2d 44 (1993); subsequently Baehr v. Miike, Supreme Court of Hawaii, n. 20371 (1999).

¹⁰ Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass, 2003).

¹¹ In re Marriage Cases (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384].

¹² Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

when racial segregation and sexual orientation were discussed in courts, especially because they carry emancipatory messages abroad.

II. Did Hollywood Influence Same-Sex Marriage in Brazil?

The working hypothesis of the present essay is that cinema influences legal change. As mentioned above, when observing Oscar-nominated movies in the United States, the interplay between law-making and film-making is evidenced by the simultaneous production of landmark decisions by the U.S. Supreme Court and blockbusters by Hollywood, that altered the mainstream perception of public opinion about both race and sexual orientation. Symbolic artifacts produced by progressive film-makers reshaped the social field and, as a result, provided fertile ground for the subsequent transformation of the juridical field. Correlation is not necessarily evidence of causation, as the ideas that shaped the decision-making of judges in the United States were a result of selected cases brought to court by legal entrepreneurs, who challenged the status quo and managed to reverse the judicial precedents that supported, for instance, the ‘separate, but equal’ doctrine¹³. The importance of the advocacy skills of lawyers cannot be ignored, and neither can the influence of cinema – the courts are embedded in the social fabric, being, as they are, hugely influenced by pop culture.

In the past two decades, Hollywood has become a powerful voice for the denunciation of homophobia. Cinema and TV series have been extremely influential in framing the debates, establishing broad social recognition, and cultivating social constructions of unfair discrimination against sexual minorities¹⁴. Cultural studies are, therefore, essential to the socio-legal analyses that I propose. First, these narratives are framing public debates all over the globe. *Philadelphia* (1993) for instance, locates the audience in a courtroom, in which discrimination against LGBT in the workplace is debated. *Brokeback Mountain* (2005) frames the discussion about same-sex marriage, inviting the audience to reflect on the reason the lead characters were prohibited from experiencing their love as a married couple. Once these Hollywood blockbusters were released, these framed debates were reproduced everywhere and thus became global discussions. To quote Richard Sherwin, “through law films we confront the great moral dilemmas of the day, whether it is the intractable racism depicted in *To Kill a Mockingbird* (1962), the effects of homophobia depicted in *Philadelphia* (1993), or the legitimacy of capital punishment in films like *Dead Man Walking*”¹⁵.

Second, members of the LGBT movement now possess a different type of social recognition. Cinema and TV series are powerful sources of status and social recognition; not surprisingly, then, LGBT associations have criticized the negative image of sexual minorities in films like *Silence of the Lambs* (1991) and *Basic Instinct* (1992) and battled to reverse the trend of Hollywood films in the early 1990s. Gays, lesbians, bisexuals, and transsexuals were no longer depicted as insane criminals, but instead as victims of an unjust society. This difference, of social recognition in cultural artifacts, transformed the regime of incentives and sanctions

¹³ See Michael Klarman, ‘Brown, Racial Change, and the Civil Rights Movement’ (1994) 8 *Virginia Law Review* 7

¹⁴ Jane D. Brown, ‘Mass Media Influences on Sexuality’ (2002) 39 *The Journal of Sex Research*, 42

¹⁵ Richard K. Sherwin, ‘Law and Popular Culture’ in Austin Sarat (ed), *The Blackwell Companion to Law and Society* at 101-102 (Blackwell Publishing, 2008).

in many societies. Since 1993, many members of LGBT associations have openly assumed their sexual orientations and denounced the discrimination they have suffered. Their stories are analogous to the narratives of *Philadelphia* (1993), *Boys Don't Cry* (1999), and *Brokeback Mountain* (2005), constituting a very important part of the LGBT strategy to overcome subordination¹⁶. Moreover, increased visibility of LGBT people in the media has naturally resulted in the demystification of sexual minorities¹⁷. On the other hand, invisibility could lead to the conclusion that same-sex relations are unusual and deviant¹⁸.

Third, films and TV series shape the mind of frequent viewers through the 'cultivation effect'¹⁹. Social constructions are cultivated through the pop culture one consumes and heavy viewers tend to believe that television is a mirror of social life, even though cinema, TV series and the overall content of mass media often do not correspond to social experience. Pop culture also creates expectations about how the law should be and, therefore, can induce people to idealize legal experience. Sometimes the influence of mass media can be identified clearly, as when Canadian citizens complained that the local police were not respecting their Miranda rights²⁰.

Most of the time, however, the influence of mass media is less visible, since the message contained in a fictional narrative is absorbed by a viewer and used unconsciously as a source for decision-making. Judges can recall references from pop culture that are subtly etched into their memories, whilst genuinely believing that they are actually referring to traditional legal sources. Imagine, for instance, that a foreign Justice was persuaded of the unfairness of homophobia after watching *Brokeback Mountain* (2005) or *Will and Grace*. Once faced with a same-sex marriage case in his own jurisdiction, this foreign Justice could eventually interpret U.S. constitutional law according to the pop culture previously consumed.

The idea that same sex marriage should be the law of the land was, in this hypothesis, cultivated inside the mind of this Justice and, faced with the case, he refers to U.S. law instead of Hollywood cinema. Nonetheless, the real influence behind his decision was pop culture rather than any judicial precedent. This particular influence of pop culture is termed 'availability': the use of pop culture as a source for decision-making without being conscious of it.²¹

Empirical research has also shown that pop culture creates the impression that we live in a violent world, by intensifying the public awareness of criminality. Even though contemporary societies are extremely safe,²² mass media cultivates a "mean world view". Given all the conflict and the violence consumed in cinema and TV, viewers tend to think that we live in an extremely violent and uncaring society.²³

¹⁶ Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex", "Gender", and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 Cal L Rev 1

¹⁷ Sara Barker Netzley, 'Visibility That Demystifies: Gays, Gender, and Sex on Television' (2010) 57:8 Journal of Homosexuality 968

¹⁸ Deborah A Fisher et al, 'Gay, Lesbian, and Bisexual Content on Television' (2007) 52:3-4 Journal of Homosexuality 167

¹⁹ George Gerbner, 'Cultivation Analysis: an Overview' (1998) 3 Mass Communication & Society 175

²⁰ Sherwin (n. 14) 100.

²¹ Michael Asimow and Shannon Mader, *Law and Popular Culture: a Course Book* (Peter Lang Publishing, 2007) 55

²² Steve Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Penguin, 2011)

²³ Gerbner (n. 18) 185.

Regarding the LGBT movement, as mass media and social activists that publicize cases of discrimination and homophobia, the message that sexual minorities are victims of constant violence is disseminated and cultivated in the minds of viewers. This particular effect is known as “resonance”, in which such cultivation is amplified by the fact that fictional characters from these minority groups are more frequently victimized in mass media.²⁴

Narratives in the pop culture of today rarely contain messages of moral condemnation, but often depict LGBT as martyrs of their sexual orientation. Since 1993, cinema has shown sexual minorities in a more positive light. In addition to films, TV series have also helped to alter society’s perception of homosexuality²⁵ and watching *Will and Grace* may encourage more tolerant attitudes toward gay men.²⁶ Mass media, therefore, has influenced social transformation.

Would it be possible, however, to demonstrate that pop culture influenced the Brazilian Supreme Court decision to recognize same sex marriage as the law of the land? My argument is that pop culture has impacted the Brazilian Justices. Hollywood movies are quickly translated, widely distributed, and pervasively publicized. Their narratives contain implicit messages that influence people in peripheral countries more than judicial precedents, academic work, and legal writings could.

Analyzing, for instance, the same sex cases in the Brazilian Supreme Court (*Governor of Rio de Janeiro v. Federal Republic of Brazil; Federal Attorney General v. Federal Republic of Brazil*), the court did not cite any traditional legal source produced in the recent academic debate about same sex marriage in the United States. Likewise, Brazilian Justices did not cite any of the relevant precedents of State Supreme Courts. Rather than citing the contemporary legal materials related to sexual orientation, the Brazilian Supreme Court cited philosophers – from Nietzsche and Plato to Hart and Dworkin – as well as older precedents from the Warren court. There was no reference, however, to contemporary legal theory or to the same sex cases in Hawaii, Massachusetts, California, and Iowa.²⁷

Furthermore, the legal source for the Brazilian Supreme Court decision remains unclear. As Justice Mendes highlighted, the Brazilian Civil Code reproduced the constitutional text, which states that the family is constituted by the stable union of a man and a woman. The constitutional text, therefore, could not provide the legal source for the right to marry someone of the same sex. Likewise, Brazilian legal scholarship has not developed Queer

²⁴ Gerbner (n. 18) 182-3.

²⁵ Michael Morgan and James Shanahan, ‘The State of Cultivation’ (2010) 54 *Journal of Broadcasting and Electronic Media* 337 at 341

²⁶ Edward Schiappa, Peter Gregg, and Dean Hewes, ‘Can one TV Show Make a Difference? Will and Grace and the Parasocial Contact Hypothesis’ (2008) 51 *Journal of Homosexuality* 15. The authors did not demonstrate causation, but rather correlation between watching the show and having positive attitude towards gay men. They did not discard the possibility that viewers with favorable opinion about gay men were more likely to watch the program in the first place.

²⁷ Janet Halley, *Split Decisions: How and Why to Take A Break From Feminism* (Princeton University Press, 2006); Laurence H Tribe, ‘Lawrence v. Texas: the □ Fundamental Right □ That Dares Not Speak its Name’ (2004) 117 *Harv L Rev* 1893; Francisco Valdes, ‘Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex”, “Gender”, and “Sexual Orientation” in Euro-American Law and Society’ (1995) 83 *Cal L Rev* 1; Baehr v. Lewin, 74 Haw. 530, 852 p.2d 44 (1993); subsequently Baehr v. Miike, Supreme Court of Hawaii, n. 20371 (1999) *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass, 2003). In re Marriage Cases (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384]. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

legal theory, nor a liberal discourse of legal protection for sexual minorities. In contrast with the United States, law schools do not offer courses on sexual orientation and the law.

Finally, there was no judicial precedent that recognized same sex marriage in Brazil. Until the landmark decisions of the Brazilian Supreme Court in *Governor of Rio de Janeiro v. Federal Republic of Brazil* and *Federal Attorney General's Office v. Federal Republic of Brazil*²⁸, courts protected gay property rights as de facto associations between two individual partners, but not as a family law regime. Finally, as pointed out by Justice Lewandowski, constitutional drafters discussed the consequences of this constitutional clause and acknowledged the fact that Article 226 would prevent those identifying as LGBT from marrying. In summary, neither textual interpretation and legal doctrine, nor judicial precedents and original intent of the framers could be considered as the source of the Brazilian Supreme Court decision that recognized same sex marriage.

Pop culture, on the other hand, is arguably a source of these landmark decisions of the Supreme Court. Methodologically, it is impossible to demonstrate causation between the cultural artifacts from Hollywood and the judgment in the Brazilian Supreme Court. Empirical research in the field of cultural studies does not demonstrate the impact of mass media over decision-making. Rather, it proposes provocative discussions and suggests probable influences on individual opinion. On one hand, it is impossible to demonstrate that Hollywood films and TV series directly caused the recognition of same sex marriage in Brazil. On the other hand, it is also impossible to deny its influence.²⁹

Another strategy for evaluating the impact of pop culture on *Governor of Rio de Janeiro v. Federal Republic of Brazil* and *Federal Attorney General's Office v. Federal Republic of Brazil*,³⁰ is the search for signals of the cultivation effect. There is no citation of *Brokeback Mountain* (2005) or *Will and Grace* in the opinions of the Brazilian Supreme Court. There is, however, evidence of cultivation. Three Justices individually referred to cultural transformation in society and that the new spirit of the times demanded the recognition of these LGBT rights. This transformation can be clearly attributed to the change promoted by Hollywood films and TV series since *Philadelphia* in the social recognition of those identifying as LGBT as martyrs of their sexual orientation.

In addition, three opinions also referred to the necessity to eliminate the constant homophobia that victimizes LGBT and generates daily violence against sexual minorities. Their comments could be attributed to the before-mentioned “resonance” that amplifies the perception that these minorities suffer constant violence, and lead to the Justices highlighting the notion that it is a “mean world” for the LGBT community. Regardless of the truth of such a statement, this kind of justification is peculiar for a Supreme Court ruling.

²⁸ ADPF n. 132/08, j 05/05/11; ADI n. 4277/09, j 05/05/11.

²⁹ Borrowing a methodological insight from the film *Smoke* (Miramax Films, 1995), measuring the influence of Hollywood is analogous to measuring the weight of smoke. According to Paul Auster's screenplay, in Queen Elisabeth I's reign, Sir Walter Raleigh weighed a cigar, smoked it carefully, deposited the ashes and leftovers on the scale, and measured the weight of smoke by subtracting the weight of all the other elements from the original weight of the non-smoked cigar. In the case of the Brazilian Supreme Court decisions on same-sex marriage, subtracting the extremely low weight of text, doctrine, precedents, and original intent, the influence of the cultural transformation promoted by mass media becomes evident - even if it is difficult to capture it through standard social science methods.

³⁰ ADPF n. 132/08, j 05/05/11; ADI n. 4277/09, j 05/05/11.

Justice Fux classified the case as a “human drama”, which should be solved by the normative force of the constitution.³¹ Drama is the fabric of Hollywood and this choice of words starkly demonstrates how the Justice analogized the facts of the case with cinematic narrative. Justice Fux also mentioned the U.S. Supreme Court precedents as comparative evidence for the recognition of same sex marriage in Brazil. According to his opinion, “the U.S. Supreme Court provides examples that constitutional values require the constitutional protection of same sex marriage”.³² Since there was no precedent of the U.S. Supreme Court at that point in time, Justice Fux could be said to have tapped in to pop culture as a source of his decision-making and in fact merely imagined that his decision was based on a judicial precedent.³³ It is an example of the previously referred ‘availability’, in which the brain accesses information from pop culture and interprets it as originating from a different and more legitimate source.

Similarly, Justice Mello expressed a distorted view of American constitutional law and based his decision on the right to pursue happiness, alleging that the U.S. Supreme Court recognized this right in several rulings. It would appear another clear case of “availability”, since the U.S. Supreme Court has never recognized that plaintiffs are entitled to pursuit of happiness. Many opinions, therefore, justified same-sex marriage on the basis of cultural transformations, the “mean world view”, the existence of a human drama, and misinterpretation of U.S. Supreme Court precedents.

Finally, two interviews were conducted to evaluate the hypothesis that popular culture was influential in the legal change in Brazil regarding same sex marriage. I interviewed a lawyer who litigated these cases as the attorney of an LGBT association. In his interview, he admitted that his thesis would be based on property rights, but he was warned by the LGBT association that this case was a special one and their arguments should be based on human dignity and LGBT identity rights. In his opinion, it would be unlikely that the Brazilian Supreme Court would have reached this verdict twenty, ten, or even five years ago, as the Justices were far more conservative, even in very recent history. He felt that the Supreme Court was making history that day and that this single decision could have a revolutionary effect on people’s behavior towards minorities.

When asked about the reference to a “human drama” in the Supreme Court ruling, the attorney did not associate it with cinema, TV series, or indeed any form of pop culture. Even if he watched *Brokeback Mountain* (2005), *Philadelphia* (1993), and *Boys Don’t Cry* (1999) and enjoyed these movies, he did not accept that these cultural artifacts could have played a role in the decisions of the Brazilian Supreme Court. Asked about the lack of citation of precedents from the United States in the Brazilian same sex marriage cases, the attorney explained that

³¹ *Id* p 80.

³² *Id* p 84.

³³ Michael Asimow suggested that perhaps the Brazilian *Justice* was influenced by the widespread news regarding the recognition of same-sex marriage by the Supreme Court of California. Even if this is the case, it would just demonstrate that the Brazilian *Justice* did not examine the direct sources of law, but instead resorted to sources from the media and popular culture instead of carefully examining the relevant cases from U.S. Constitutional Law, especially since *Obergefell v. Hodges* was only decided later by the U.S. Supreme Court.

they could not cite *Lawrence v. Texas*³⁴ since it was a sodomy case, but they did cite the Californian case in their petition.

Asked about the reversal of the Californian ruling by a state constitutional amendment and about precedents from Hawaii, Massachusetts, and Iowa,³⁵ the attorney admitted that he was not aware of these legal developments. Asked about the source of law in the Brazilian same sex marriage cases, the attorney admitted that he could not reference any of the traditional sources of law. According to him, the Supreme Court could not have used the constitutional text as the justification, as the Civil Code basically reproduced the words of the Brazilian constitution, which states that the family is constituted by the stable union between a man and a woman. The court bypassed the constitutional text, asserting that article 226 provided only an example, but not the concept of marriage nor the definition of family. However, he remained unable to explain the legal source for this decision. At the end of his interview, the attorney conceded that perhaps society has changed its perception of LGBT rights and, therefore, the Brazilian Supreme Court redefined the definition of family and the concept of marriage in Brazilian law.

I also interviewed an LGBT activist, who was named by the lawyer as the leading strategist of the same sex marriage cases among the LGBT associations. The LGBT activist explained that the governor of Rio de Janeiro took the initiative to protect gay rights and decided to take this opportunity to advocate LGBT civil unions. They lobbied with the Brazilian President, Minister of Justice, Human Rights Secretary, and the Federal Attorney General, as well as other public authorities. As a consequence, the Federal Attorney General filed a constitutionality control claim and argued that the limitation of marriage to heterosexual couples only in the Brazilian Civil Code was unconstitutional. Before the judgment, LGBT activists visited all the Brazilian Supreme Court Justices in order to distribute writings that supported same sex civil unions.

Asked about precedents from other courts, the LGBT activist mentioned that a case from the Colombian Supreme Court was cited in the documents given to the Brazilian Justices, but was not alluded to by any of them when voicing their opinions. From their conversations with each Justice, their confidence that they would win the case grew. In these meetings, three Justices reacted to the subject with comments about excesses of judicial activism and were considered to be unsympathetic to their cause. Surprisingly, these three justices were favorable to civil unions. The other seven justices recognized same-sex marriage in Brazilian law and ruled the limitation in the Brazilian civil code to be unconstitutional. Thus, a unanimous Supreme Court recognized LGBT marital rights related to their personal relationship and a majority granted the status of marriage to these same-sex relationships.

Due to the changing social climate of the nation over the previous years, public response to the decision was generally positive. The LGBT movement was essential for this transformation in both the social climate and institutional environment towards the recognition of same sex marriage in Brazil. In 1995, a Brazilian Association of Gays, Lesbians,

³⁴ 539 U.S. 558 (2003).

³⁵ *Baehr v. Lewin*, 74 Haw. 530, 852 p.2d 44 (1993); subsequently *Baehr v. Miike*, Supreme Court of Hawaii, n. 20371 (1999) *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass, 2003). *In re Marriage Cases* (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384]. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

Bisexuals, and Transsexuals (ABGLBT) was created. There were only 31 NGOs, the gay pride parade of 1995 united only 200 people in São Paulo, and only 7% of the population supported same sex marriage. It was then that LGBT activism began its exponential increase. There are currently 237 NGOs and the gay pride parades in Rio and São Paulo are huge.

Asked specifically about the role of cinema, TV series, and soap operas in this social transformation, the LGBT activist recognized the importance of pop culture for the broad acceptance of same sex marriage. Particularly in the case of soap operas, the LGBT movement mobilized its constituents and has campaigned against stereotypical representations of sexual minorities in popular soap operas since 1999. The LGBT activist pointed to the example of a relatively obscure couple of lesbian characters in a particular soap opera and how hundreds of critical letters were sent to the TV station requesting that better treatment be given to sexual minorities by screenwriters.

In the same way, the impact of Hollywood films cannot be ignored, since the Supreme Court Justices do not live inside a bubble and are influenced by pop culture just as much as the average citizen. The LGBT movement considers cinema to be a fundamental tool for the positive reshaping of sexual minorities in the eyes of society and, to this end, their national association website includes a long list of recommended films.³⁶ Asked about the absence of a list of books, the LGBT activist blamed the lack of resources. Regarding the lack of reference to foreign sources in the Brazilian Supreme Court judgment, the LGBT activist supposes that the Justices preferred to produce an original opinion and, therefore, did not cite the Colombian constitutional court.

However, all Justices cited the concept of homoaffection coined by Maria Berenice Dias, vice-president of the Brazilian Association of Family Law; the idea that LGBT relationships are not only based on sex, but are also focused on affection.³⁷ Even if some criticize the cleanliness of the concept of homoaffection,³⁸ it was essential for the acceptance of same sex marriage in a conservative society. The LGBT movement remained discreet during the judgment and deliberately avoided a march on the capital. It was a strategy to avoid a large-scale conservative reaction from the Catholic Church and the religious right. The LGBT activist would have preferred a more confrontational style, but was aware that the Brazilian society does not respond well to this line of advocacy. If possible, he would have adopted the style of American activist Harvey Milk, whom he views as a paradigm for the LGBT movement.³⁹

After the Supreme Court decision, conservatives proposed a popular referendum against same-sex marriage, but the proposition was rejected in the Brazilian congress. In addition, 45% of Brazilians supported same-sex marriage according to a poll made in Brazil after the Supreme Court decision.⁴⁰ Asked about the constitutional clause limiting family to

³⁶ See <http://www.abglt.org.br/port/filmes.php> (last checked on 01/31/16).

³⁷ Maria Berenice Dias *União homoafetiva: o preconceito e a justiça* (4th Ed. Editora Revista dos Tribunais, 2009).

³⁸ According to the interviewee, some LGBT activists consider that they should adopt a more radical perspective instead of adjusting their conduct to patterns and standards borrowed from heterosexual relationships. Therefore, in this context, the idea of cleanliness expressed in the interview seemed to be equivalent to straightness.

³⁹ <http://milkfoundation.org/about/harvey-milk-biography/> (last checked on 25/03/17).

⁴⁰ See <http://ultimosegundo.ig.com.br/brasil/pesquisa-revela-que-55-dos-brasileiros-sao-contrario-uniao-gay/n1597104761368.html> (last checked on 25/03/17)

an entity originated by the union between a man and a woman, the LGBT activist stated that the rule established by Article 226 of the Brazilian constitution should not prevail over fundamental principles of human dignity and equality. In his opinion, this clause violates the essence of the Brazilian constitution.

III. Does Hollywood Protect Minorities?

It would be absurd to propose the argument that Hollywood is a champion of minority rights in the vein of (for instance) the National Association for the Advancement of the Coloured People (NAACP). It would also be absurd to suggest that Spike Lee and Sidney Poitier have been more important figures for the legal protection of African Americans than Thurgood Marshall and Martin Luther King. Clarifications are, therefore, essential. Minorities protect themselves predominantly through human rights movements, community organization, counter-hegemonic discourses, and adjudication of their interests in courts. The battlefield for racial affirmative action can be seen to involve the power dynamics of everyday life, ranging from the Montgomery bus boycotts and the electoral registration practices to the march on Washington and the litigation in *Brown v. Board of Education*.⁴¹

Furthermore, it should be noted that Hollywood films are generally reproducing the hegemonic discourse within U.S. society. Between 1934 and 1968, film producers were expected to comply with the rigid standards of the MPPDA production code.⁴² It was strictly prohibited to discuss miscegenation, homosexuality, and abortion during this period, in which film content was purified by this conservative self-regulatory mechanism.⁴³ Additionally, prejudice against black individuals was a common connotation of many Hollywood films, such as D.W. Griffith's *Birth of a Nation* (1915) and David Selznick's *Gone With the Wind* (1939). Moreover, black characters of this era were often representations of painfully misguided stereotypes of slaves, criminals, or servants. As Asimow and Mader put it, 'all these constantly repeated stereotypical roles in the movies as well as television became a powerful signifier of black inferiority and white superiority,' reinforcing the ideology of racism, damaging prospects for racial equality, and affecting the self image of blacks within society.⁴⁴ Likewise, contemporary romantic movies usually depict the search for romantic love of white heterosexual couples, reinforcing the marginalization of inter-racial and same-sex couples. Even films sympathetic to minorities had their discriminatory moments, such as in *Philadelphia* (1993), when the movie needlessly questions whether Tom Hanks' character had sex with strangers - an irrelevance to the overall plot and, therefore, a strange part.⁴⁵ Therefore, in general, Hollywood films often reproduced mainstream hegemonic ideas as opposed to alternative counter-hegemonic narratives. On the other hand, it would also be disingenuous to ignore the importance of the symbolic capital of counter-hegemonic films that challenged the status quo and advanced the African American cause.

⁴¹ See, for instance, Mark Tushnet, *Brown v. Board of Education: the Battle for Integration* (Franklin Watts 1995)

⁴² Asimow and Mader (n. 20) 22.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Asimow and Mader (n. 20) 222.

For instance, the landmark ruling of *Loving v. Virginia*⁴⁶ – declaring the state anti-miscegenation act unconstitutional and prohibiting all race-based restrictions on marriage – was accompanied by the release of *Guess Who's Coming to Dinner* (1967). The movie portrayed tensions emerging from the decision of a white upper-class woman to marry an African American physician she met in Hawaii. When Joanna brings home her fiancé to introduce to her parents, she is puzzled by the reluctance of her supposedly liberal Californian parents to accept their decision of having an interracial marriage. Not only are Joanna's parents surprised with the prospect of having a black son-in-law, but also at her fiancé's family's resistance to the idea that the bride was not an African American woman. Therefore, symbolically, the film is a companion to the U.S. Supreme Court decision, inviting the audience to reflect on the discomfort that their families felt with interracial marriage and providing powerful images of the unjust discrimination experienced by the couple. As expected of any typical Hollywood screenplay, there is a happy ending as both families ultimately bless the interracial marriage. In spite of the strong criticism the film received due to its perceived artificiality and refusal to denounce the severe racial injustice of the United States,⁴⁷ *Guess Who's Coming to Dinner* (1967) offered the first interracial kiss in a Hollywood movie and provided the first favourable depiction of a marriage between a white woman and an African American man. Being a Hollywood blockbuster, the movie was nominated for eight Oscars and made a profit of seventy million dollars at the box-offices. Critically, it was well received even in the Southern states, became an iconic text, and constituted symbolic capital for affirmative action defenders throughout the globe.

A connection could also be established between the landmark U.S. Supreme Court case *Brown v. Board of Education*⁴⁸ and *To Kill a Mockingbird* (1962).⁴⁹ During the Warren court (1954-1969) the U.S. Supreme Court took an active role in desegregation, establishing a dialogue with civil rights activists that abolished the 'separate but equal' doctrine of Jim Crow laws.⁵⁰ During this period, minorities entered the Oscar running with repeated nominations of movies about the dramas of African-Americans, Asians, Puerto Ricans, Jewish, and other immigrant groups.⁵¹ From a slim spectrum of eighty movies nominated for the Oscar for best

⁴⁶ 388 U.S. 1 (1967).

⁴⁷ See, for instance, Glen Anthony Harris and Robert Brent Toplin, 'A Clash of Interpretations Regarding Stanley Kramer's Film on the Subject of Interracial Marriage' (2007) 40 *The Journal of Popular Culture* 700

⁴⁸ 347 U.S. 483 (1954).

⁴⁹ Asimow and Mader (n. 20) 38.

⁵⁰ see Klarman, (n. 12).

⁵¹ 'Love is a Many-Splendored Thing' (1955) discussed the ostracism imposed to an Asian woman in Hong Kong after her marriage with a white American man; 'Sayonara' (1957) focused also on prejudice as the consequence of a marriage between an Asian woman and a white American Air Force member, except that this time she was Japanese and they suffered discrimination inside the military; '12 angry men' (1957) touched discrimination against a Puerto Rican defendant as a grand jury seems ready to convict him based on stereotypes; 'The Defiant Ones' (1958) showed how a white and a black fugitive learn to respect each other while cooperating to escape prison; 'The Diary of Anne Frank' (1959) revealed the suffering of a Jewish teenager, while hiding in Nazi-occupied Amsterdam; 'West Side Story' (1961) addressed discrimination by telling a contemporary version of Shakespeare's 'Romeo and Juliet' with Puerto Ricans instead of Capulet; 'Judgment at Nuremberg' (1961) dealt with holocaust, persecution of Jews, and the Nuremberg trials; 'To Kill a Mockingbird' (1962) portrayed the unfair trial of a black defendant in Alabama; 'America, America' (1963) denounced the massacre of Armenians in Turkey; 'Lilies of the field' (1963) placed an African American in the position of guardian angel in a community of poor European nuns; 'In the Heat of Night' (1967) placed an African American policeman inside an investigation in racist south; 'Guess Who's Coming

film during the Warren period, twelve contained plots or sub-plots related to discrimination of race, religion, or ethnicity.

On one hand, it is clear that Hollywood did not cause the wave of identity rights associated with the civil rights movement. On the other hand, even restricted by the conservative rules of the MPPDA production code, Hollywood cinema echoed the voices of activists, protesters, and lawyers in various productions inspired by the emancipative climate of the Warren years. Therefore, there was a public dialogue established between the film-makers and law-makers. During this period in which these twelve films were produced in Hollywood and subject to great discussion in the public sphere, before being awarded their nominations for best film, the Warren Court delivered landmark verdicts against racial discrimination in the US.

In addition to *Brown v. Board of Education* (1954) and *Loving v. Virginia* (1967), there were six other extremely important cases: *Bolling v. Sharp* (1954) addressed school desegregation in DC;⁵² *Lucy v. Adams* (1955) addressed school desegregation at University of Alabama;⁵³ *Cooper v. Aaron* (1958) decided that states had to adopt policies to desegregate their schools;⁵⁴ *Gamillion v. Lightfoot* (1960) prohibited electoral districts especially designed to disenfranchise African American voters;⁵⁵ *Griffin v. County School Board* (1964) prohibited an educational program that closed public schools and provided private vouchers to students, so that they could attend private segregated schools;⁵⁶ *Green v. County School Board of New Kent County* (1968) banned a 'freedom of choice plan' that masked de facto segregation, determining the formulation of a realistic desegregated system.⁵⁷ Since the U.S. Supreme Court did not determine the immediate end of segregation, but rather its gradual abolition with 'all deliberate speed',⁵⁸ popular culture can still be seen as an essential aspect of the huge cultural transformation experienced in the US. In the case of racial discrimination, however, it was the Warren court that demonstrably led the revolution.⁵⁹ Hollywood simply followed the wave of anti-discrimination judicial decisions with a series of anti-discrimination films.

In terms of sexual orientation, however, a conservative Supreme Court was pushed into debating same-sex marriage by a progressive Hollywood. With *Hollingsworth v. Perry* and *United States v. Windsor*,⁶⁰ the U.S. Supreme Court finally entered into the socio-legal dispute

to Dinner?' (1967) discussed inter-racial marriage between a white woman and an African American physician.

⁵² 347 U.S. 497 (1954).

⁵³ 350 U.S. 1 (1955).

⁵⁴ 358 U.S. 1 (1958).

⁵⁵ 364 U.S. 339 (1960).

⁵⁶ 377 U.S. 218 (1964).

⁵⁷ 391 U.S. 430 (1968).

⁵⁸ See, for instance, Charles J. Ogletree Jr, *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education* (WW Norton & Company, 2005); Jim Newton, *Justice For All: Earl Warren And The Nation He Made* (Penguin, 2007); Bernard Schwartz, *A History of the Supreme Court* (Oxford University Press, 1993); Mark Tushnet, *Brown v. Board of Education: the Battle for Integration* (Franklin Watts, 1995); Mark Tushnet, *The Constitution of the United States of America: a Contextual Analysis* (Hart, 2009).

⁵⁹ Gerald N. Rosenberg, *Hollow Hope: Can Courts Bring about Social Change* (2nd ed. Chicago University Press, 2008).

⁶⁰ 570 U.S. ____ (2013)

regarding same-sex marriage, referencing Californian Proposition 8 and the Defense of Marriage Act (DOMA).⁶¹

Hollywood has promoted discussions about sexual orientation for decades. It is true, however, that until very recently gay and lesbian characters were depicted in a very negative light in Hollywood movies. In the early years of cinema (1900-1934), representations of racial and sexual minorities frequently and consistently contained scenes of naive – but nonetheless harsh – discrimination. *Uncle Tom's Cabin* (1927) and *The Gay Divorcee* (1934) provide striking examples of this era, in which representations of black and gay men manifested in a highly stereotypical fashion; characters were submissive and did not dispute their low rank in society.⁶²

In the intermediate years (1934-1960s) there was strong censorship as the Hay Code prohibited narratives of sexual 'perversion' and interracial relationships. Over the course of three decades, African Americans and sexual minorities were invisible on the screen. During these 'closet years', gay motifs in *Spartacus* (1960), *Ben Hur* (1959), and *Cat on a Hot Tin Roof* (1958) were either removed from the screenplay or disguised in various subtle ways – so as not to be rejected by censors yet still convey the message. During the sixties, however, the gradual erosion of the MPPDA code coincided with a period of films that dealt directly with the conflict and emancipation of racial and sexual minorities. In addition to Blaxploitation cinema and its anti-'Uncle Tom' films, there were a growing number of productions nominated for best motion picture at the Academy Awards that engaged with the issue of discrimination against lesbians, gays, bisexuals, and transsexuals (LGBT).⁶³

Throughout the history of LGBT representation in Hollywood cinema, many of its films functioned to denigrate the image of sexual minorities. Take the example of *The Silence of the Lambs* (1991), in which the serial killer is the transsexual Buffalo Bill. LGBT-led protests regarding the film's perceived homophobic content did not prevent it from winning all major five Oscars (film, director, screenplay, leading actor, and leading actress). It could be said that up to and including *The Silence of the Lambs* (1991), the dominant Hollywood image of the gay man or woman was a very negative one.

Philadelphia (1993) is a clear turning point, as the core of its narrative constitutes a powerful critique of homophobia in contemporary American society. In *Philadelphia*, the gay character is a successful lawyer who is fired because his supervisors discover that he suffers from AIDS. Instead of simply accepting social discrimination, he decides to sue the law firm for his discriminatory marginalization. *Philadelphia*, therefore, represents an early attempt by Hollywood to project a message of support for sexual minorities and, indeed, a call for their emancipation. Once again, however, the gay character dies, but this time the narrative

⁶¹ Proposition 8 was a statewide initiative to make same-sex marriages illegal in California, which was approved during elections of 2008. DOMA was a federal U.S. law defining marriage as the union between a man and a woman and allowing states to deny recognition of same-sex marriages celebrated in other states.

⁶² One of the reviewers asked for a clarification about the film *Gay Divorcee*, because this film is not about homosexuals but about divorce. Even if it is true that the word 'gay' of the movie's title doesn't mean homosexual, there is a homosexual character in a supporting role, which is depicted in a highly stereotypical way. The reference here is not to the main character, but rather to this one in the supporting role.

⁶³ Among the films nominated for the Oscar of best motion picture are the following films: *Rachel, Rachel* (1968); *Midnight Cowboy* (1969); *Kiss of Spider Woman* (1985); *The Crying Game* (1992); *American Beauty* (1999); *Brokeback Mountain* (2005); *Capote* (2005); *Milk* (2008).

contains a Christ-like virtue,⁶⁴ encouraging audiences to empathize with him, as a messianic bearer of old-fashioned bigotry.

In the past two decades, sexual minorities have largely ceased to be depicted as murderous maniacs – as seen in *Basic Instinct* (1992), for example – and, instead, have been cast as martyrs of the LGBT cause. *Milk* (2008), *Brokeback Mountain* (2005), and *Boys Don't Cry* (1999) are examples of blockbusters that denounced the conflict, violence, and subordination experienced by sexual minorities. Since 1993, Hollywood depicts those identifying as LGBT no longer as crude villains, but instead as heroic victims of our society. These films – and the TV series such as *Will & Grace* and *Modern Family*, for instance – are calls for justice in favour of sexual minorities. By denouncing the subordination of sexual minorities in cinema, Hollywood advances the protection of the LGBT community throughout the globe.⁶⁵ This radical transformation of the cultural representation of sexual orientation was followed by a series of state Supreme Court decisions favorable to same-sex marriage that eventually culminated with the landmark decision of the U.S. Supreme Court in *Obergefell v. Hodges*.⁶⁶

IV. Final remarks

In conclusion, popular culture is important for legal change and influenced the legalization of same-sex marriage in Brazil. Obviously, LGBT activism was fundamental for the Supreme Court decision, but popular culture was arguably an even more important vehicle for normative ideas than U.S. doctrine, foreign scholarly articles, or precedents from the U.S. State Supreme Courts. There are no references to books or foreign legal materials on the website of the ABGLBT, but there is a list of international films. By the time of the Brazilian Supreme Court decision, there were not many doctrinal books written on the subject and the existing ones were not widely discussed in Brazilian society or academia⁶⁷. Popular culture was clearly a powerful source of transformation of the social climate and institutional environment regarding the recognition of same sex marriage in Brazil. Since it is difficult to identify traditional formal sources of law as justification for the Brazilian Supreme Court decision, popular culture could be perceived as a key source of legal transformation in the Brazilian same-sex marriage cases. Unfortunately, we cannot precisely measure its impact, but we should also not deny its strong influence.

Additionally, Hollywood films carry messages of affirmative action regarding anti-discrimination, protection of minorities, and racial tensions. In peripheral countries, most decisions from the U.S. Supreme Court are unknown or are only superficially known. However, cinema is a vehicle for the dissemination of emancipatory ideas. Even if these films are never cited as a legal source by courts across the world, they definitely travel much more easily than judicial precedents, inspiring legal change and adoption of affirmative action

⁶⁴ Asimow and Mader (n. 20) 36.

⁶⁵ See Bradford J. Kelley, 'The Rainbow Sea Change: The Impact of Popular Culture on Homosexual Rights' (2013-2014) 16 *Scholar* 283

⁶⁶ 576 U.S. ____ (2015).

⁶⁷ Maria Berenice Dias *União homoafetiva: o preconceito e a justiça* (4th Ed. Editora Revista dos Tribunais, 2009); Paulo Roberto Iotti Vecchiatti *Manual da homoafetividade: da possibilidade jurídica do casamento civil, da união estável e da adoção por casais homoafetivos* (Editora Método, 2008); Glauber Moreno Talavera, *União civil entre pessoas do mesmo sexo* (Editora Forense, 2004).

policies elsewhere. Even if the Warren Court was the main engine of the civil rights revolution in the U.S., Hollywood movies facilitate the circulation of these values to other countries. This affirmative cinema carries these normative ideas, amplifying their volume and reaching more audiences than the few elite lawyers familiar with the U.S. Supreme Court elsewhere. Therefore, Hollywood movies protect minorities across the globe as a resonance box of affirmative action initiatives developed originally in the U.S. that are reflected in their narratives.